No. 86-1698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL DISTRIBUTION CENTERS, INC.,
Petitioner,

—against—

WALSH TRUCKING CO., INC., COASTAL FREIGHT LINES, INC., HEMPSTEAD DELIVERY CO., INC., NATIONAL RETAIL TRANSPORTATION, INC., FRANCIS J. WALSH, JR., KENNETH B. HENNING, MARK S. TICE, RAYMOND WEISS, CARMINE SABATINI and CHUCK HANNON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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May 14, 1987

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the court of appeals, after reviewing the record as a whole in the light most favorable to the plaintiff, err in holding that the evidence was insufficient to permit a reasonable jury to find that the defendants attempted to monopolize, or that they conspired to monopolize or restrain trade, in violation of the Sherman Act?[1]

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1 Pursuant to Supreme Court Rule 28.1, respondent Walsh Trucking Co., Inc. states that it is a wholly owned subsidiary of National Retail Systems, Inc., and that it is the parent corporation of Walsh Trucking & Consolidating Co., Inc., Walsh Marking & Consolidating Services, Inc., and F.N.P. Transport Systems, Inc. Respondent Coastal Freight Lines, Inc. states that it is a wholly owned subsidiary of respondent National Retail Transportation, Inc., and that it has no subsidiaries. Respondent Hempstead Delivery Co., Inc. states that it is a wholly owned subsidiary of Hi-Speed Trucking, Inc., which is a wholly owned subsidiary of National Retail Systems, Inc., and that it has no subsidiaries. Respondent National Retail Transportation, Inc. states that it is a wholly owned subsidiary of National Retail Systems, Inc., and that it is the parent corporation of American Delivery Service, Inc. and respondent Coastal Freight Lines, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

The petition does not present any issue warranting review by this Court. What petitioner is seeking in essence is a second appellate review of the sufficiency of the evidence to support a jury verdict in an antitrust case that should never have been presented to the jury in the first place. That is true for a variety of reasons, only some of which the court of appeals found it necessary to consider.

The issue in this predatory pricing case is whether the Court of Appeals for the Second Circuit erred in holding that the evidence did not permit a reasonable jury to find an attempt to monopolize, or a conspiracy to monopolize or restrain trade, in violation of the Sherman Act.

More specifically, with respect to the attempt to monopolize claim, the issue is whether the jury could reasonably have found the requisite dangerous probability of successful monopolization of the relevant market where (1) the defendant was a new entrant with zero market share when the alleged predatory pricing began; (2) the plaintiff at that time was the dominant factor in that market with a 50% share; (3) the defendant's entry prices, although below the plaintiff's, were at or above those charged by other competitors; (4) eight other carriers, in addition to the defendant, entered the market for the first time during the period of alleged predation; (5) after the end of its first year of operations in the market, the defendant raised its prices to admittedly nonpredatory levels, and (6) by that time the defendant had achieved no more than a 17% market share, whereas the plaintiff still remained the market leader with 33%.

With respect to the claim that the defendant Walsh and certain former employees of the plaintiff conspired to monopolize and unreasonably restrain trade by predatory pricing, the issue is whether the jury could reasonably have found a conspiracy when there was not a scintilla of evidence that the employees knew of, much less that they participated in, Walsh's alleged predatory pricing scheme.

STATEMENT OF THE CASE

The $38 million treble damage judgment entered against respondents in the district court was predicated upon three jury findings of antitrust liability—each of which had at its core the charge of predatory pricing: (1) that defendant Walsh and four family-owned trucking companies—the principal one being defendant National Retail Transportation, Inc. ("NRT")—had attempted to monopolize the less-than-truckload transportation of garments on hangers ("GOH") along a single traffic lane, the "Pennsylvania corridor," by charging predatory rates when NRT first entered that market in 1983; (2) that Walsh had conspired with the other individual defendants, all former

employees of the plaintiff International Distribution Centers, Inc. ("IDC"), to monopolize the same market—the conspiracy supposedly having been formed in late 1982 *before* those employees left IDC to join NRT and *before* NRT entered the market; and (3) that the identical pre-employment conspiracy had unreasonably restrained competition in the same market.

The court of appeals, after reviewing the record in the light most favorable to the plaintiff, concluded that no reasonable jury could have made these findings on the record before it (App. A at 11a-12a, 17a-18a, 19a, 21a).[2] It therefore reversed the judgment and remanded the case to the district court for entry of judgment in favor of the defendants (*Id.* at 7126).

THE FACTS

The largely undocumented statement of facts in the Petition is replete with erroneous assertions, gross distortions and false innuendoes. Much of its content simply reiterates statements made by petitioner to the court of appeals which respondents were obliged to correct below. We shall not repeat that exercise here, but shall confine ourselves to a brief recital of the salient facts of record which demonstrate that the court of appeals was eminently correct and that this case does not present any issue warranting further review by this Court.[3]

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2 The opinion of the court of appeals is annexed to the Petition as "Appendix A" and page references to that opinion in this brief are preceded by the designation "App. A." Citations to the record, as contained in the Joint Appendix to appellants' and appellee's briefs in the court of appeals, are preceded by the designation "A."

3 Illustrative of the manner in which petitioner has played fast and loose with the record is the reference to IDC's bankruptcy on July 15, 1985 (Petition, p. 8), followed by the assertion that NRT's pricing "resulted in the destruction of IDC and injury to all competitors in the Pennsylvania corridor" (*Id.* at 17). The fact of the matter is that the bankruptcy petition was filed a year and one-half *after* NRT admittedly ceased its alleged predatory pricing, and there is not a scrap of evidence in the record illuminating why the filing occurred—which is hardly surprising since the record in this case covers a period ending

The relevant market in this case is a particular trucking service involving less-than-truckload carriage of garments on hangers along the Pennsylvania corridor (*Id.* at 4a). The plaintiff's principal business was to provide transportation between the New York garment center and contractors' factories in Pennsylvania.[4] To haul GOH, truckers suspend steel bars from the roofs of their trailers so that the garments can be hung from the bars.[5] In addition, ropes are attached to the bars, and more GOH are hung from loops tied in the ropes.[6] The cost of modifying a trailer to install bars is negligible—approximately $3,000.[7]

The plaintiff started business in the 1930s and was the dominant carrier of GOH in the Pennsylvania corridor.[8] Its business was insulated from the rigors of competition by the ICC's pervasive regulation of the trucking industry until deregulation occurred pursuant to the Motor Carrier Act of 1980.[9]

January, 1984. Nor is there any factual basis for IDC's statement that other competitors in the relevant market were injured as a result of NRT's pricing. To the contrary, as the court of appeals noted, these "other trucking firms . . . had been unaffected by NRT's employee raids or alleged predatory pricing" (App. A at 12a).

Another example of petitioner's proclivity to take liberties with the record is the reference to the alleged murder of Mr. Eskow's predecessor at IDC (Petition, p. 5)—an inflammatory hearsay statement which the district court specifically excluded on the ground that it had no relevance to any issue in the case (Trial Transcript, p. 2411).

4 A0890, A0951, A1018-20; PX232 (A0478).

5 A1123-27, A1364-65, A1883.

6 A1123-27, A1870-71, A1883, A1531, A2035-38, A2091.

7 A1127-28.

8 PX 17 at 1-2 (A0305-06); *see also* A0898-99, A2130.

9 Pub. L. No. 96-296, 94 Stat. 793 (codified as amended at 49 U.S.C. §§ 10101-11917 (Supp. IV 1980)). Until the 1980's, the ICC's pervasive regulation of the trucking industry had resulted in "a government-enforced cartel." DTX 223 (Ex Parte No. MC-166, Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of

Prior to that time, "[r]egulatory barriers to entry, rate regulation and the collective determination of rates through rate bureaus" had combined to produce non-competitive rates and to protect inefficient carriers.[10] The most significant entry barrier was the need to obtain operating authority from the ICC, which applied the statutory standard of "public convenience and necessity" so as "to protect incumbent carriers by artificially barring entry."[11] All that changed with deregulation. As the Department of Justice put it, "[t]he central characteristic of this industry, now that Congress and the ICC have substantially eased entry restrictions, is that entry is relatively easy"[12]—either on a *de novo* basis or by geographic expansion on the part of existing carriers.[13] In light of that fact, the Department of Justice, FTC and ICC all concluded that monopolization and predation were "unlikely to be successful in the trucking industry . . . ."[14]

One of many companies to take advantage of deregulation was the defendant NRT, which entered the Pennsylvania corridor in January 1983 at a time when the plaintiff IDC was the dominant factor with a market share of 50%.[15] The balance of

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1980 (Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission, January 17, 1983), at 14 (A0709)) (hereinafter "DTX 223, FTC Comments" (A0696-723)).

10 DTX 223, FTC Comments at 14-15 (A0709-10).

11 DTX 223 (Ex Parte No. MC-166, Pricing Practices Of Motor Common Carriers of Property Since The Motor Carrier Act Of 1980 (Comments of the Department of Justice, January 17, 1983), at 14 (A0641)) (hereinafter "DTX 223, DOJ Comments" (A0626-95)).

12 DTX 223, DOJ Comments, at 12 (A0639).

13 *Id.* at 17-18 (A0644-45).

14 DTX 223, DOJ Comments, at 22 (A0649); DTX 223, FTC Comments, at 26 (A0721); DTX 710, ICC Decision, at 11 (A0762).

15 App. A at 5a; A1128.

the market was then divided among five other competitors.[16] On the heels of deregulation, however, not only NRT but eight other carriers began carrying GOH in the Pennsylvania corridor for the first time.[17] One of these was a *de novo* entrant;[18] the others were carriers operating in other traffic lanes which expanded into the corridor, or which began to carry GOH in addition to their traditional carton freight.

When it became apparent that NRT, having hired certain disaffected IDC employees, was planning to enter the Pennsylvania corridor, the President of IDC, Gerald Eskow, arranged for a meeting with Walsh of NRT (App. A at 5a). According to Eskow, he told Walsh that the purpose of his visit was to determine the "rules of the ball game;" that he did not believe in cut-throat price competition; and that he asked Walsh to travel the "high road" with him by avoiding that type of competition—just as Eskow had done with Silver Line, his largest competitor.[19] There is a dispute about what happened next, but in light of the jury's verdict, the court below accepted Eskow's version that Walsh, after declining the invitation to forego price competition, stated that he would destroy the plaintiff by hiring away employees and charging non-compensatory prices.[20]

When it initially entered the Pennsylvania corridor, NRT priced slightly below IDC's rates[21] but at or above those of other competitors.[22] In January, 1984, after a year of opera-

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16 . A1128, A0975, A1049, A1062, A1122, A1366-67, A1397, A1476, A1587, A1637-38, A1722, A1880, A1927, A1932, A1947, A2071, A2072, A2135-36, A2138, A2147-48, A2188-89; DTX 45 at 1 (A0511); DTX 163 at 2 (A0557); DTX 282 at 1 (A0732).

17 A0887-88, A0975, A1068, A1109-10, A1122, A1167-68, A1182, A1366-67, A1392-93, A1397, A1476, A1830, A1850, A1927-28; DTX 45 at 1 (A0511); DTX 218 (A0623-24); DTX 235 (A0726); DTX 444 at 1 (A0747).

18 A0887-88, A0975, A1182-83.

19 PX 93 at 1 (A0333); PX 88 (A0331-A0332); A0917, A1077, A1079-82.

20 App. A at 5a; PX 93 at 1-2 (A0333-34); A0900-01.

21 A1101-07, A2146; *see* A1091-93; DTX 659A (A0808).

22 App. A at 12a; A2137-38; *see* DTX 218 at 1 (A0623); DTX 659A (A0808).

tions, NRT raised its rates to levels which IDC conceded were not predatory.[23] By that time, not only had nine new carriers entered the market in the wake of deregulation, but all of the incumbent carriers remained as competitors; IDC's market share had dropped from 50% to 33%,[24] but it still remained the market leader; and NRT had increased its share from zero to either 10% (NRT's estimate) or 17% (IDC's estimate) (App. A at 12a, n. 4).

The Jury's Verdict

After the district court denied defendants' motion for a directed verdict, the case was submitted to the jury, which sustained all three of IDC's antitrust claims and awarded damages before trebling of $13.2 million—the precise amount sought by the plaintiff.[25] Defendants then moved for judgment *n.o.v.*, contending that there was no rational basis for the jury's findings of antitrust liability and damages. The motion was denied.[26]

The Decision Below

On appeal, the court of appeals unanimously reversed, holding that no reasonable jury could have found either an attempt to monopolize, or a conspiracy to monopolize or restrain trade.

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23 A1001-02, A0785-807, A1862.

24 This figure comes from IDC's own damage theory (PX 224 (A0455-68)). Although IDC offered no market share evidence at trial, the record permitted reasonable estimates. According to IDC, with $22.7 million in 1982 revenues, it commanded 50% of the alleged relevant market immediately prior to NRT's entry (A1128, A1809; PX 224 at 10(A0464)). It follows from IDC's own proof, therefore, that the total "market," was approximately $45.4 million. On this basis, IDC's $7.3 million revenue decline in 1983—from $22.7 million to $15.4 million—represented a 17 percentage point drop in market share from 50% to 33%.

25 A0181-87; A2241-42. The jury rejected a claim that defendants had misappropriated IDC trade secrets.

26 The district court ordered a slight remittitur of IDC's treble damage award from $39.6 million to $38.2 million.

With respect to the attempt claim, the court below "presumed" for purposes of its analysis that NRT had the specific intent to monopolize and had engaged in some form of anticompetitive conduct (App. A at 8a).[27] But the court concluded that, given the competitive structure of the market and the low entry barriers, in no event could the jury have reasonably found the requisite dangerous probability of monopolization:

> "Under the conditions in the market for the carriage of garments on hangers in the Pennsylvania Corridor . . . , NRT's market share was not sufficiently significant to give rise to a dangerous probability that it would monopolize the market even when its anticompetitive conduct is taken into account. A jury could not reasonably find that such a probability existed without engaging in speculation concerning matters not in evidence.
>
> "Thus, we conclude that IDC failed as a matter of law to establish that NRT, which had at most a seventeen percent market share one year after it entered an intensely competitive market with low entry barriers, had a danger-

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27 Given Eskow's version of his meeting with Walsh (although it was sharply contradicted by Walsh), defendants did not argue in the court below that the evidence was insufficient to sustain a finding of a specific intent to monopolize. Defendants did, however, vigorously maintain that there was no reasonable basis for any finding of predatory pricing, the only alleged anticompetitive conduct submitted to the jury (A2215-16). In that connection defendants contended that the plaintiff's predatory pricing study was fatally defective because it employed the wrong legal standard—that is, in the case of a start-up operation like NRT's, it was erroneous to test NRT's start-up prices against actual, rather than reasonably anticipated, variable costs. *See* Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 1074 (1982). The court of appeals expressly left this point undecided (App. A at 8a, n. 2) because it was able to dispose of the attempt-to-monopolize claim on the ground that the record did not permit a reasonable jury to find a dangerous probability that the relevant market would be monopolized by the alleged predatory pricing. By the same token, the court below did not reach defendants' further contention that since NRT's rates were at or above those of existing competitors other than the plaintiff's, NRT's pricing was not predatory as a matter of law.

ous probability of successfully monopolizing that market" (App. A at 13a).

As for the conspiracy claims, after assessing the record to determine "whether the totality of the evidence, viewed most favorably to the plaintiff, was sufficient to support the jury's verdict" (*Id.* at 15a-16a), the court of appeals concluded that the evidence "simply does not give rise to a reasonable inference that any of the IDC defendants agreed to assist Walsh in waging a predatory price war, or to do anything else except work for him" (*Id.* at 17a). Since "plaintiff did not offer a scintilla of evidence that any of the IDC defendants knew of or participated in the predatory pricing scheme" (*Id.* at 19a), the plurality of actors necessary for a finding of conspiracy under Sections 1 and 2 of the Sherman Act was lacking, and the defendants were therefore entitled to the entry of judgment in their favor.[28]

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28 In light of its rulings on the Sherman Act violation issues, the court of appeals did not reach defendants' additional contention that the record provided no rational basis for the damage award, which (1) assumed that every sale which IDC lost in 1983 was diverted to NRT, despite IDC's admission that it proved only about half of its lost sales went to NRT; (2) assumed that IDC would not have lost a single 1983 sale to NRT had it not been for NRT's alleged predatory pricing, despite the fact that, as a new entrant, NRT would inevitably have taken some business from IDC—even without underpricing it; and (3) projected IDC's 1983 lost sales for a 10-year period on the bizarre assumptions (a) that once plaintiff had lost a customer, its business could never be regained, despite the admitted fact that by 1984 NRT had raised its rates to IDC's level, and (b) that for the entire 10-year period IDC would not have been able to reduce any of the expenses which it treated as fixed in the year 1983.

Other issues raised by defendants which the court below had no occasion to reach concerned prejudicial errors in the jury instructions with respect to the district court's refusals to define "monopoly power" under Section 2 and to explain the nature of the rule-of-reason inquiry under Section 1.

REASONS FOR DENYING THE WRIT

I.

The dispositive reason for denying the writ is that this Court does not sit to reassess the sufficiency of the evidence to support jury verdicts after the court of appeals has discharged that function in accordance with accepted standards of appellate review. That is what happened here. Scrutinizing the evidence as a whole in the light most favorable to the plaintiff, the court below concluded that no reasonable jury could have found any of the alleged antitrust violations. In reaching that conclusion the court made a "careful search of the record" (App. A at 17a) compiled during a six-week trial in a case that should never have survived the defendants' motion for a directed verdict.

II.

In reviewing the record, the court of appeals correctly applied settled principles of antitrust law. There is nothing novel about its determination.

First, the court below properly recognized—as did the trial judge in his instructions to the jury[29]—that there are three essential elements to a claim of unilateral attempted monopolization under Section 2 of the Sherman Act. The plaintiff must show that: (1) the defendant specifically intended to monopolize; (2) the defendant, in furtherance of that objective, actually engaged in anticompetitive conduct; and (3) the defendant's conduct, while falling short of achieving monopoly power, created a "dangerous probability" of achieving it.[30] Thus, even if the first two elements of the offense are estab-

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29 A4689.

30 Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 85 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 54 (2d Cir. 1979).

lished, failure to prove a dangerous probability of monopolization is fatal to the plaintiff's cause.

There is nothing new about the requirement that an attempt to monopolize claim be supported by proof of a dangerous probability that monopoly power will ultimately be achieved. The requirement harks back to Mr. Justice Holmes' opinion in *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905). The jury was so charged in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946).[31] And, except for the aberrational *Lessig* case and its progeny in the Ninth Circuit,[32] it has been recognized as an indispensable element of proof by a uniform stream of federal appellate precedents.[33]

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31 The trial judge in the *American Tobacco* case defined an attempt to monopolize as "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it."

32 Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). Even in the Ninth Circuit certain panels have not followed *Lessig*. *See* Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. of Pa. L. Rev. 125, 155 (1980).

33 *E.g.*, *First Circuit*: George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550, 554 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Second Circuit*: Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir. 1980); *Third Circuit*: Edward J. Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Fourth Circuit*: Stearns v. Genrad, Inc., 752 F.2d 942, 947 (4th Cir. 1984); *Fifth Circuit*: Deauville Corp. v. Federated Dept. Stores, Inc., 756 F.2d 1183, 1191 (5th Cir. 1985); *Sixth Circuit*: White and White, Inc., v. Am. Hospital Supply Corp., 723 F.2d 495, 506-08 (6th Cir. 1983); *Seventh Circuit*: Mullis v. Arco Petroleum Corporation, 502 F.2d 290, 297 (7th Cir. 1974); *Eighth Circuit*: National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1025 (8th Cir. 1985); *Tenth Circuit*: E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305-06 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *Eleventh Circuit*: Quality Foods v. Latin AM. Agribusiness Devel., 711 F.2d 989, 996 (11th Cir. 1983); *District of Columbia Circuit*: Neumann v. Reinforced Earth Co., 786 F.2d 424, 428 (D.C. Cir.), *cert. denied*, 107 S.Ct. 181 (1986); *Federal Circuit*: Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 875 (Fed. Cir. 1985). *See also*, General Foods Corp., 3 Trade Reg. Rep. (CCH) ¶ 22,142 at

It is for good reason that the courts insist that there be proof not only of monopolistic intent and anticompetitive conduct, but also a dangerous likelihood that the defendant will ultimately succeed in acquiring monopoly power. As this Court has explained, unilateral conduct is unlawful only when it "pose[s] a danger of monopolization" because this "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). That risk is especially great where, as here, the challenged conduct involves vigorous price competition, since cutting prices in order to secure business is the very essence of competition. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 106 S.Ct. 1348, 1360 (1986). In declining the plaintiff's invitation to dispense with the necessity of proving a dangerous probability of monopolization, the court below acted not only in accordance with settled precedent but with a view toward preserving the competitive values which the antitrust laws are designed to promote.

Petitioner would have this Court depart from established precedent, including its own, and adopt a rule of *per se* illegality under Section 2 applicable to a "single firm's intentional anticompetitive behavior" (Petition, p. 15). In other words, it would expunge the "dangerous probability" requirement from the law, despite the fact that the Court only recently reiterated that "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization."

22,977 (F.T.C. 1984) ("The more elusive assessment of conduct . . . can be avoided where no dangerous probability of successful predation is present"). Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, 783 F.2d 159 (10th Cir. 1986), cited by petitioner (Petition, p. 15), is not to the contrary. The jury instructions in that case, which were upheld on appeal, expressly required a finding of "a dangerous probability that King Soopers could succeed in monopolizing the relevant market"—a finding that presupposed that the defendant possessed "market strength that approaches monopoly power; that is, the ability to control prices and exclude competition" (783 F.2d at 162).

Copperweld Corp. v. *Independence Tube Corp.*, *supra*, 467 U.S. at 768. The rule advocated by petitioner is thus at war not only with controlling judicial precedent but with recognized legislative intent.

This is hardly the first time that a petitioner has sought review in this Court of the need to show a dangerous probability of success in an attempt-to-monopolize case. Ever since *Lessig* was decided by the Ninth Circuit more than 20 years ago, the Court has repeatedly declined to grant *certiorari* in such cases. *See Mobil Oil Corp.* v. *Blanton*, 471 U.S. 1007, 1008 (1985) (Mr. Justice White, dissenting). Beyond that, this is not an appropriate case in which to consider the *Lessig* question because the court of appeals did not *find*, but simply *presumed*, the existence of anticompetitive conduct in the form of predatory pricing. In so doing, it never reached (1) defendants' frontal attack on the measure of cost employed by IDC's pricing study,[34] or (2) the further argument that NRT could not have been guilty of predatory pricing when, as the court below found (App. A at 12a), its rates were at or above the levels of competitors other than IDC.[35]

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34 IDC's predatory pricing claim was based solely upon a study which attempted to prove only that NRT's 1983 entry rates were below its actual variable cost during its startup period, rather than trying to prove that NRT's rates were below its "reasonably anticipated" variable costs—a fatal failure, defendants argued, particularly in the case of a new entrant like NRT whose actual variable costs are expected to be abnormally high during its startup period; indeed, for NRT to have charged non-predatory prices under IDC's study, it would have been obliged to enter the market with rates 50% above IDC's (A1765-66)—competitive suicide for a newcomer trying to wrest business away from the entrenched market leader.

35 Petitioner's argument that this case involves anticompetitive conduct in addition to alleged predatory pricing is belied not only by the court of appeals' review of the record (App. A at 17a), but by the district court's charge to the jury ("IDC s claim of anticompetitive conduct is that defendants engaged in predatory pricing") (A2215-16). Specifically, petitioner's assertions that defendant Walsh engaged in a pattern

As a fall back position, petitioner argues that this Court should review the case in order to adopt a "sliding scale approach for demonstrating the elements of an attempt to monopolize" (Petition, p. 18). Wholly apart from its lack of merit, this theory was not presented to the jury, was not briefed below, and should not be trotted out for the first time at this late date.

Applying established law, the court of appeals was eminently correct in concluding that no reasonable jury could have found a dangerous likelihood that Walsh would monopolize the relevant market. Petitioners have conceded that the claimed predatory pricing did not continue after the first year of NRT's operations. At that juncture, the plaintiff still possessed a commanding 33% of the market, whereas the defendant—a new entrant—enjoyed no more than half that share. Even more importantly, the market, freed from the constraints of prior government regulation, had witnessed an influx of other competitors, thereby attesting to virtually non-existent barriers to entry. It is common ground among courts, economists and legal commentators that if a market is easy to enter, there is no reasonable prospect that it can be monopolized. That is because no competitor in such a market, however large its share, can exercise market power since any effort to raise its prices to supracompetitive levels will trigger new entry and preclude the realization of monopoly profits. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 106 S.Ct. 1348, 1357-58 (1986); *cf. United States* v. *Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984) (upholding merger producing nearly a 50% market share; no reasonable probability that competition would be substantially lessened since entry barriers low). The short of the matter is that the evidence of ease of entry in this case was overwhelming, and the court of appeals properly held that no

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of acquisitions in the relevant market, hired employees to damage competitors rather than on their merit, and intimidated customers are wholly unsupported by the record.

reasonable jury could have found otherwise (App. A at 13a).[36] Far from being a candidate for monopolization, the Pennsylvania corridor was much more competitive a year after the entry of NRT and the other carriers than it had been when the plaintiff controlled half the business and there were only five other competitors.

Little need be said about the conspiracy counts. There was not a shred of evidence to support the alleged pre-employment conspiracy claim that was submitted to the jury.[37] All that the plaintiff showed was that several disaffected IDC employees were hired by Walsh. There was no evidence whatsoever that any of these employees was even aware of, much less that they joined, any predatory pricing scheme against IDC.

In sum, this case was correctly decided on its facts by the court below and presents no issue worthy of review by this Court.

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36 The evidence included not only the advent of a host of new competitors in the relevant market, but findings by the Department of Justice, FTC and ICC which are epitomized by the statement that "trucking has no significant entry barriers . . . even for the LTL segment." DTX 223, DOJ Comments at 16 (A0643).

37 The district court correctly instructed the jury, without objection by the plaintiff, that it could not find a conspiracy between Walsh and the former IDC employees *after* they had gone to work for NRT because "employees of what's essentially the same entity for antitrust purposes cannot conspire with one another or the entity that employs them while they are employees of that entity" (A2225). *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984).

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

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May 14, 1987

PROOF OF SERVICE

I, Milton Handler, attorney for Respondents herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 14th day of May, 1987, I served copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari by delivering same by hand to Malcolm A. Hoffmann, 12 East 41 Street, New York, New York 10017. I further certify that all parties required to be served have been served.

May 14, 1987

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